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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 LUIS LERMA, on behalf of
11 himself and all other similarly
12 situated California residents,
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Plaintiffs,
v.

SCHIFF NUTRITION
INTERNATIONAL INC. , a
Delaware Corporation, and
SCHIFF NUTRITION GROUP,
INC., a Utah Corporation,
Defendants.

CASE NO. 11cv1056-MDD

ORDER DENYING MOTION TO
RECONSIDER RULING ON
MOTION TO STAY
SETTLEMENT APPROVAL
PROCESS

[ECF NO. 118]

On December 22, 2014, the parties filed a Stipulation to Stay Settlement Approval Process and Engage in Further Mediation. (ECF No. 116). The Court construed the stipulation as a motion to stay and denied the motion on January 25, 2015. (ECF No. 117). On January 30, 2015, Plaintiffs filed a "Response to Court's January 25, 2015 Order . . . Regarding Motion to Stay Settlement Approval Process. (ECF No. 118).

The Court's Order did not invite a response. Rather than reject it, however, the Court will construe the response as a Motion to Reconsider. As construed, the motion is **DENIED**.

As in their prior Motion, which was denied by the Court, Plaintiffs

1 present their concern that final approval of the settlement agreement
2 preliminarily approved by this Court on November 21, 2014, is rendered
3 doubtful as a consequence of a decision rendered by the Court of Appeals
4 for the Seventh Circuit in a similar case. *See Pearson, et al., v. NBTY,*
5 *Inc., et al.*, 772 F.3d 778 (7th Cir. 2014). In its earlier Order, the Court
6 rejected the view that the *Pearson* decision required a stay of the
7 proceedings in this case to allow the parties to return to mediation and
8 consider changing their settlement agreement. On the question of
9 whether to continue or stay the settlement process, the Court finds that
10 differences between the instant settlement agreement and the
11 settlement agreement in *Pearson*, and differences in circuit law, do not
12 require a continuance or stay in this case. Nothing new in that regard
13 was presented to the Court in the instant Motion. The parties remain at
14 liberty to consider modifying their settlement agreement and jointly
15 presenting any modifications to the Court.

16 In their motion for reconsideration, Plaintiffs also ask the Court to
17 consider the impact of a settlement agreement in a case pending in the
18 Southern District of New York, with different plaintiffs and different
19 defendants, in which the defendants agreed, as part of the stipulated
20 injunctive relief, to refrain from using synonyms to the language which
21 prompted the lawsuit. (ECF No. 118 *2 and Exh. A to ECF No. 188).
22 The Court will not rule in advance of any objections regarding whether
23 synonyms should be included in the injunctive relief to be ordered in this
24 case upon final approval. That such terms were negotiated in another
25 case with different parties in a different court does not justify a stay or
26 continuance in the instant case. The parties may choose to preempt an
27 anticipated objection by negotiating changes and jointly moving the
28 Court to accept an amendment to the settlement agreement. This Court

1 will not require the parties to pursue that path; it is entirely up to them.

2 At the time of the settlement agreement and preliminary approval
3 in the instant case, the district court in *Pearson* already had determined
4 that the injunctive relief in that case had no value in terms of
5 considering the overall value of the agreement to the class and in
6 considering the appropriateness of the fee request. The Seventh Circuit
7 agreed. *Pearson* at 785-86. In this Circuit, however, as the parties
8 acknowledged in moving for preliminary approval, injunctive relief can
9 be given a value and that value can be part of the consideration of the
10 Court regarding the appropriateness of a fee request in this Circuit. *See*,
11 *e.g.*, *In re: Ferrero Litigation*, 583 Fed. Appx. 665, 668 (9th Cir. 2014);
12 *Carr v. Tadin, Inc.*, 2014 WL 7499454 *3 (S. D. Cal. December 5, 2014).
13 This is particularly true when a lodestar method ultimately is used to
14 determine the appropriate fee. *Id.*

15 This Court expresses no view regarding how it may rule on any
16 objections to final approval. Nor is the Court expressing any view
17 regarding how it would respond to a request to continue the final
18 approval hearing in the event the parties agree to modify their
19 settlement agreement in some way and move the Court for approval of
20 the modification. As matters now stand, however, the motion to
21 continue or stay the settlement approval process and hearing, and the
22 motion to reconsider the denial of that motion, are and remain DENIED.

23 IT IS SO ORDERED.

24 DATED: February 2, 2015

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27 Hon. Mitchell D. Dembin
28 U.S. Magistrate Judge